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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE DELUCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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54 pp

QUESTION PRESENTED FOR REVIEW

Whether this Court's analysis in Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431 (1994), which led to the conclusion that a "statement" under Rule 804(b)(3) of the Federal Rules of Evidence consists of a "single assertion, declaration or remark," should be applied to the term "statement" as used in subsection (e)(2) of the Jencks Act, 18 U.S.C. § 3500.

PARTIES TO THE PROCEEDING

George DeLuca, Elisa DeLuca, and Gustavo Grajales-Montoya were the appellants in the Court of Appeals for the Eighth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINION IN THE COURT BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 23

APPENDIX

Decision of the Court of Appeals For the Eighth Circuit . . . App. 1

Order Denying Petition for Rehearing filed by Gustavo Grajales-Montoya . . . . . App. 24

TABLE OF AUTHORITIES

CASES

Campbell v. United States,
365 U.S. 85 (1961) 18, 20

Goldberg v. United States,
425 U.S. 94 (1976) 12, 20

Jencks v. United States,
353 U.S. 657 (1957) . . . . . passim

Palermo v. United States,
360 U.S. 343 (1959) . . . . . passim

United States v. Ben M.
Hogan Co., Inc.,
769 F.2d 1293 (8th Cir. 1985),
vacated on other grounds,
478 U.S. 1016 (1986) 15, 16

United States v. Bennett,
75 F.3d 40 (1st Cir.),
cert. denied, ___ U.S. ___,
117 S.Ct. 130 (1996) 14

United States v. Cuesta,
597 F.2d 903 (5th Cir.),
cert. denied, 444 U.S. 964
(1979) 14, 15

United States v. Donato,
99 F.3d 426 (D.C. Cir. 1996) 13

United States v. Foley,
871 F.2d 235 (1st Cir. 1989) 15

United States v. Gross,
961 F.2d 1097 (3d Cir.),
cert. denied, 506 U.S. 965 (1992) . 14

United States v. Harris,
543 F.2d 1247 (9th Cir. 1976) . . . 16

United States v. Morris,
957 F.2d 1391 (7th Cir.),
cert. denied, 506 U.S. 941 (1992) . 13

United States v. North America
Reporting, Inc.,
761 F.2d 735 (D.C. Cir.),
cert. denied, 474 U.S. 905 (1985) . 15

United States v. Willis,
997 F.2d 407 (8th Cir. 1993),
cert. denied, 510 U.S. 1050
(1994) 16, 17

Williamson v. United States,
512 U.S. 594,
114 S. Ct. 2431 (1994) . . . . . passim

STATUTES AND RULES

18 U.S.C. § 3500 . . . . . 1, 9

28 U.S.C. 1254(1) 1

Fed. Rules of Evid.
Rule 804(b)(3) 17

OPINION IN THE COURT BELOW

The decision of the Court of Appeals for the Eighth Circuit is reported at 117 F.3d 356 (8th Cir. 1997).

STATEMENT OF JURISDICTION

The decision and order of the Eighth Circuit affirming the conviction was entered on June 26, 1997. (App. 1) A timely petition for rehearing was filed by co-appellant Gustavo Grajales-Montoya, and was denied by order dated and entered on July 29, 1997. (App. 24) This Court has jurisdiction to review the order of the Eighth Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Jencks Act, 18 U.S.C. § 3500, provides:

> Demands for production of statements and reports of witnesses
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the

possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material

excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial

be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT OF THE CASE

Petitioner George DeLuca, his wife Elisa DeLuca, and several others were indicted on federal charges involving drug distribution in the St. Louis area. Petitioner, a 56 year old with no prior record, was convicted, following a jury trial, and is serving a term of life imprisonment. (App. 2-3)

Elisa DeLuca was the mastermind of the drug distribution activity and the evidence tying Petitioner to narcotics or to his wife's narcotics activity was sparse. The essential witnesses against Petitioner were Brian Linzie, a St. Louis drug dealer who was an indicted co-conspirator, and Maria Zulma Torres, a New York supplier of cocaine.

A key issue at trial involved defense access to notes taken during the government's interviews of these two witnesses. The defense sought access to

these notes in the belief that, in their interviews with the government, the witnesses had provided information that would have supported the defense that Petitioner was uninvolved in and unaware of his wife's activities.

At the time Linzie testified, defense counsel expressed his profound disbelief that no notes or records were taken of the government's interviews with Linzie. The prosecutor, AUSA Steven Holtshauser, insisted that no "Jencks Act" material existed, leaving the impression that, notwithstanding defense counsel's skepticism, no notes were taken at all. (Nov. 20, 1995 at 98-108) Case agent Sweeney, who sat at counsel table, never corrected this picture. But before Sweeney was called to testify for the government, after Linzie's testimony had been completed, the government declared that Sweeney <u>had</u> taken notes at the initial

proffer meeting with Linzie. (Nov. 22, 1995 at 2-3) The government, however, refused to produce them, asserting that they did not "contain any Brady material" and that they "in no way, shape or form constitute Jencks materials." (Nov. 22, 1995 at 2-3) The trial court directed that Sweeney's notes be preserved (Nov. 22, 1995 at 22), but did not order their production to the defense or examine them in camera.

Likewise, although Zulma Torres testified at trial that those present at her July 1995 interview -- including the AUSA -- took notes, no notes were produced, the government having taken the position that "no Jencks or Brady materials" were generated in connection with the interviews. (Nov. 8, 1995 at 262)

On appeal to the Eighth Circuit, Assistant United States Attorney Holtshauser conceded that he had taken notes at his interviews with Zulma Torres

and at his interview with Linzie. (Govt. Br. at 41, 43-44) The government, however, took the position that the defense had failed to "show with reasonable particularity that material which may be a Jencks statement exists in the government's possession," and that therefore DeLuca was not entitled to in camera review of the Linzie and Zulma Torres notes it had by then conceded existed. (Govt. Br. at 42-43) The government, in so arguing, never claimed that these interview notes did not contain verbatim quotes of the witnesses. The government's position, at least on appeal, was that, even if the notes did contain quoted material, neither the complete notes, nor any verbatim quotes from them, were producible statements under Jencks. (Govt. Br. at 45-47)

The Court of Appeals for the Eighth Circuit did not rule directly on whether notes containing substantially verbatim

quotations of the witness's words were producible, in whole or in part, under the Jencks Act. Rather, although the government did not even concede the existence of notes taken by the AUSA until the filing of its appellate brief, the Court ruled that the Petitioner had made no showing that these notes contained any substantially verbatim quotations, and thus upheld the district court's decision not to conduct any in camera review. (App. 8-10) The Court of Appeals likewise denied DeLuca's motion that the Court of Appeals conduct such a review itself. (App. 9)

REASONS FOR GRANTING THE WRIT

The central question in this case is what constitutes a "statement" of a witness within the meaning of subsection (e)(2) of the Jencks Act, 18 U.S.C. § 3500. A subsidiary question is whether, where the definition of a statement is unclear, the decision that a document does not

constitute or contain a statement can be left solely to the prosecutor, without the court at least reviewing the document in camera.

Where notes have been taken during the interview of a witness, the Courts of Appeals are not fully in accord on when these notes, or portions of them, will be deemed "statements" for purposes of the Jencks Act. In any event, this Court's recent decision in Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431 (1994), mandates that the question be given a fresh look.

Subsection (e)(2) defines "statement" to include

> a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement ...

In Palermo v. United States, 360 U.S. 343, 352 (1959), which involved an agent's brief

summary of a lengthy conference with a witness which the agent prepared after the conference had ended, this Court held that the phrase "other recording" in the then recently enacted Jencks Act encompassed "more than mere automatic reproduction of oral statements," 360 U.S. at 352; it could include recordings taken by hand. However, Mr. Justice Frankfurter also noted that, in enacting the Jencks Act, Congress was concerned that an expansive reading of the Jencks decision, Jencks v. United States, 353 U.S. 657 (1957), would compel the undiscriminating production of agent's summaries of interviews regardless of their character or completeness.

Mr. Justice Frankfurter wrote:

> It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment. It was important that the statement could fairly be deemed to reflect fully and without distortion what had been

said to the government agent.

Palermo v. United States, 360 U.S. at 352.

After Palermo, this Court repudiated a narrow reading of the Jencks Act, and recognized that the trial courts have substantial responsibility for ascertaining whether particular notes are producible under Jencks. Thus, in Goldberg v. United States, 425 U.S. 94 (1976), the Court rejected arguments that statements taken by government lawyers were not disclosable under the Jencks Act. The Goldberg Court read the Act's legislative history, not to limit the scope of this Court's decision in Jencks, but to reaffirm Jencks' holding "that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at trial." 425 U.S. at 104 (citation omitted).

Although Palermo dealt with an agent's summary of an interview made after the interview had ended, a number of courts, relying on Justice Frankfurter's language in Palermo, have rejected Jencks Act claims for notes taken during the interview of witness even where the notes contain verbatim records of things that the witness said. These decisions focus on "whether the statement can fairly be deemed to reflect fully and without distortion the witness's own words." United States v. Morris, 957 F.2d 1391, 1401 (7th Cir.), cert. denied, 506 U.S. 941 (1992) (citation omitted). Under these decisions, unless the document is a substantially verbatim record of the witness's entire narrative (and nothing else), the document is not Jencks material. See, e.g., United States v. Donato, 99 F.3d 426, 433 (D.C. Cir. 1996) (agents' notes of interview with witness were not Jencks material where

agent engaged in "substantial selection" and did not record the entire interview).

The cases, however, contain little or no analysis of why, even if the entire document is not producible under Jencks, the portions of such notes that are verbatim recitations of the witness's words are not producible under the Act. See, e.g., United States v. Bennett, 75 F.3d 40, 47 (1st Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 130 (1996) (court affirmed decision that agent's report was not Jencks material after it reviewed six page report which contained "only a few isolated direct quotes (not pertinent here)" and which was neither "structured nor phrased as a verbatim report"); United States v. Gross, 961 F.2d 1097, 1105 (3d Cir.), cert. denied, 506 U.S. 965 (1992) (presence of brief quotations is inadequate to qualify the notes as Jencks material); United States v. Cuesta, 597 F.2d 903, 914 (5th

Cir.), cert. denied, 444 U.S. 964 (1979) (notes were not Jencks material even though they contained some verbatim recitations of phrases used by the interviewee); United States v. Foley, 871 F.2d 235, 238-39 (1st Cir. 1989) (district court inspected documents and determined that FBI 302s were not contemporaneously recorded substantially verbatim recitals of oral statements; Court of Appeals, after its own review of the 302s, affirmed); United States v. North America Reporting, Inc., 761 F.2d 735 (D.C. Cir.), cert. denied, 474 U.S. 905 (1985) (Court, after reviewing attorney's notes, upheld district court determination that they were not verbatim or substantially verbatim accounts of the witnesses' statements).

The cases, however, are not all in accord. For example, in United States v. Ben M. Hogan Co., Inc., 769 F.2d 1293 (8th Cir. 1985), vacated on other grounds, 478

U.S. 1016 (1986), the trial court, after in camera review of notes taken by government attorneys during pretrial interviews of a witness, ordered the government to produce to the defense scattered sentences and phrases within the notes that were enclosed in quotation marks, but the defense rested without having received the material. 769 F.2d at 1300. On appeal, the Eighth Circuit said that "a trial court ought not employ such a process of extrapolation unless the particular circumstances are extremely compelling," but held that the defendant's claim had been waived in that case. Id. at 1301. See also United States v. Harris, 543 F.2d 1247, 1250 (9th Cir. 1976) (holding that FBI agent's rough interview notes were potentially Jencks material and condemning their destruction); United States v. Willis, 997 F.2d 407, 413-14 (8th Cir. 1993), cert. denied, 510 U.S. 1050 (1994) (suggesting that FBI agent's

report that contained "substantially verbatim statements [of a witness] that are contemporaneously recorded" would be Jencks materials).

The time is right for full consideration of the issue, in light of this Court's recent decision in Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431 (1991).

The issue in Williamson was the meaning of "statement" as used in Rule 804(b)(3) of the Federal Rules of Evidence, the hearsay exception for "statements" against interest. The question was whether "statement" meant an "extended declaration," that is, an entire narrative, or a "single assertion, declaration or remark." Williamson, 512 U.S. at ___, 114 S.Ct. at 2434-35. In Williamson, the Court looked to the underlying purpose of the hearsay exception and concluded that "statement" meant a "single declaration or

remark," rather than a "whole extended declaration." Williamson, 512 U.S. at ___, 114 S. Ct. at 2435. The same reasoning, and consideration of the law's purpose, leads to a like construction of the word "statement" for purposes of the Jencks Act.

The purpose of the disclosure requirements of the Jencks Act is to satisfy the due process right identified in the Jencks case and to enable impeachment of a government witness by showing a variation between the witness's trial testimony and a prior statement of the witness. "The command of the statute is ... designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." Campbell v. United States, 365 U.S. 85, 92 (1961). For purposes of impeachment and the fair and just administration of justice, it matters little whether the witness's entire

narrative was recorded. Each declaration or remark of the witness must be examined and treated separately. Any substantially verbatim record of the witnesses' account could be inconsistent with his trial testimony, and thus grist for cross-examination. The mandate of Jencks, and the purposes of the Jencks Act, require that every such "statement" be produced.

The Court below sidestepped the issue as to whether quotes of some of the witness's words that are contained in interview notes are covered by the Jencks Act. Instead, the Court held that Petitioner had failed to show that the notes at issue contained any "substantially verbatim quotations." But, plainly, that cannot be the burden of the defendant.

If the portions of interview notes that are direct verbatim quotations of the witness's words are producible under Jencks, then the defense made the necessary

showing that material which might well be covered by Jencks were within the government's possession, raising an issue that the court had an obligation to resolve, by in camera review of the documents or by holding of a hearing. See Goldberg v. United States, 425 U.S. 94, 108-09 (1976); Campbell v. United States, 365 U.S. 85, 94-99 (1960). There is no dispute that the AUSA and Agent Sweeney took contemporaneous notes at their interviews with the witnesses. In light of the nature and purpose of the meetings and the purpose of notetaking itself, it strains credulity to believe that the notetaker did not set down at least some of the witness's words, and record them as such. In the absence even of a representation by the government or by the notetaker himself that the notes contained no quoted declarations, surely it cannot be the defendant's burden to show that those

notes did directly quote the witness. There is no way that the defendant can make that showing without access to the notes, or, at least, the notetakers, including the Assistant United States Attorney. In this case, the Assistant United States Attorney has never represented that the notes did not contain quoted material.

The real question is thus not what threshold showing a defendant must make to obtain access to, or in camera review of, such documents. Rather, it is whether, the portions of interview notes that do contemporaneously record, verbatim or substantially verbatim, words of the witness being interviewed are "statements" within the meaning of the Jencks Act where the notes do not record <u>all</u> of what the witness said. The Eighth Circuit has not spoken coherently on the issue. And the decisions of most of the other Circuits avoid it by relying on Justice

Frankfurter's words in Palermo, which might explain why notes that contain the impressions and conclusions of the notetaker are not, in their entirety, covered by the Jencks Act, but which do not fully address the question why, or whether, records of the witness's own words contained within those notes are outside the ambit of Jencks.

The question is of undeniable and widespread importance to the criminal justice system. Few, if any, criminal cases are brought in which witness interviews have not been conducted at which notes have been taken. Common sense and common experience show that the process of notetaking is, at least in part, the process of taking down another's words. Whether, in light of Williamson, direct quotations of the witness which are recorded in such notes are producible under the Jencks Act deserves an authoritative -

decision by this Court.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant the writ of certiorari to review the decision of the Eighth Circuit.

Respectfully submitted,

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